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July 24, 2008

By Facsimile and ECF

Hon. Theodore H. Katz  
United States District Court  
Southern District of New York  
500 Pearl Street  
Room 1660  
New York, New York 10007

Re: Pure Power Boot Camp, et. al. v. Warrior Fitness Boot  
Camp, et. al. 08 CV 4810 (JGK)

Dear Judge Katz:

This brief letter is in response to new assertions and further distortions of the record raised by defendants in their letter of July 23rd. It would be nice if defendants, who have engaged in documented ongoing misconduct, could refrain from their distortions and hyperbolic characterizations, but apparently they are of the belief that the best defense is a good offense, and they cannot.

Defendants first tried to assert that the only basis for access to the emails was because plaintiffs claimed that Fell gave Lorenzi the password. When that did not work, defendants complained that they could not tell when the emails were accessed because the print dates were cut off. Prior counsel advised me that it was a copier malfunction. As I was not involved, and my client was unaware of the issue, that is the best I can provide. However, once alerted to the issue, at the request of the court, we provided the documents with the print dates and they fully support plaintiffs' assertions (assertions which defendants do not even deny- throughout their papers they acknowledge that access was well after defendants left).

Now that this misdirection has failed as well, defendants now assert for the first time that in order to determine first access to the emails, a forensic analysis was required to be conducted by plaintiffs. They once again distort the record, suggesting that Judge Katz' comment on forensic analysis was directed to the issue of access, when in fact it was directed to the question of whether Fell sent emails from Pure Power computers during work hours. There was never any discussion of forensic analysis to determine when plaintiffs' accessed the emails. Now, however, faced with print dates which confirm plaintiffs' position, defendants claim that Pure Power should have conducted a forensic analysis to show first access.

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Had it been raised before the motion was returnable, it is an issue which could have been addressed, although it is really a non-issue since defendants have conceded that the access was a month after defendants left, and it is inconceivable that if plaintiffs were aware of defendants' plot while still employed, they would have allowed defendants to continue. It is also inconceivable that plaintiffs would have accessed these damning emails and not printed them when first accessed, running the risk that they would be deleted or purged.

Second, as previously indicated, the issue of illegality is defendants' burden. If they felt forensics were required, they should have asked for it at the outset, rather than after all papers have been submitted.

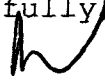
Next, defendants annex an indictment which they claim mirrors the conduct herein. Without getting into the differences, suffice it to say that I am advised by co-counsel, Stacy Richman, that these issues were preemptively presented to AUSA Marcus Asner, head of special prosecutions, who indicated that it was unlikely that if a complaint were made, the issue would be pursued, particularly in light of the greater misconduct of defendants.

To the extent that defendants assert that the explanation of access to the Warrior Fitness account is "rotten", please note that defendants do not deny that Fell used the same password for his Warrior Fitness account. To the extent that defendants find Shakespeare appropriate, perhaps the more apposite quote would be from King Lear, "How sharper than a serpent's tooth it is to have a thankless child".

I am also compelled to address defendants' unsubstantiated, vague claim of possible perjury and contrast it to the specific assertions by defendants (at least Fell as no other defendant has come forward) as to how they came to generate their 300+ contact list (personal contacts) and that they never solicited Pure Power clients, against the email itself, which expands 88 clients to over 300, says that it is information provided by a "dear friend" and has actual notes regarding solicitation, along with the solicitation emails from Lee and Baynard and the affidavit of Nicole Davis acknowledging receipt of the email "announcement".

Finally so defendants do not now claim that any issue which has not been addressed is conceded, we rely on our previous papers which address all other issues.

Respectfully,

  
RICHARD L. HERZFELD

cc: Hon. John G. Koeltl  
Daniel Schnapp, Esq.